Filed 11/3/10 P. v. Jones CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY JONES, Defendant and Appellant.	B218411 (Los Angeles County Super. Ct. No. BA345527)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed.

Suzann E. Papagoda, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Johnny Jones appeals from the judgment entered following his conviction by jury of possession of cocaine base for sale (Health & Saf. Code, § 11351.5). In a bifurcated proceeding, the trial court found defendant had suffered a prior drug-related felony conviction, supporting a three-year enhancement (Health & Saf. Code, § 11370.2, subd. (a)), and a prior serious or violent felony conviction, making him subject to sentencing under the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). Defendant was sentenced to an aggregate term of nine years in state prison. He contends the trial court committed reversible error by excluding his proffered testimony.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of August 25, 2008, Los Angeles Police Detectives Arthur Gamboa and Ronald Kitzmiller were working as undercover narcotics officers in downtown Los Angeles. They watched defendant and Calvin Moore (Moore)[2] engage in what appeared to be a hand-to-hand drug transaction on the street. Moore walked away while looking at the palm of his hand. Moore was detained by the detectives, and two

---

[1] Pursuant to *People v. Mooc* (2001) 26 Cal.4th 1216, defendant also requested that we examine the transcript of the in camera hearing conducted after his *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) was granted. Here, upon finding defendant had demonstrated good cause to discover information in each of the arresting officer's personnel and administrative records pertaining to "false police reports," the trial court granted defendant's motion and reviewed the potentially responsive documents in an in camera proceeding outside the presence of all persons except the custodian. We have reviewed the sealed record of the in camera proceeding and conclude the trial court appropriately exercised its discretion in ruling on the material to be disclosed. (See *Mooc,* at p. 1229.)

[2] Moore is not a party to this appeal.

off-white solids resembling rock cocaine fell from his hand. The detectives recovered them and took Moore into custody.

Defendant was still standing on the sidewalk, where he had encountered Moore. Detective Gamboa approached and identified himself as a police officer. Startled, defendant dropped a small "plastic bindle" containing several off-white solids resembling rock cocaine. Detective Kitzmiller immediately retrieved the bindle. Detective Gamboa searched defendant and found one $10 bill, two $5 bills and 34 $1 bills in his pants pocket. Defendant was taken into custody.

A search of defendant at the police station yielded a bindle containing numerous off-white solids resembling rock cocaine from inside his pants. The off-white solids taken from Moore and defendant tested positive for cocaine base and weighed .13 grams, .23 grams and 1.23 grams respectively. Based on their individual training and experience, Detectives Gamboa and Kitzmiller each opined defendant possessed the cocaine base for purposes of sale.

Defendant testified on his own behalf to using cocaine periodically for about 20 years. On the evening of August 25, 2008, he was in the area with some cash to buy rock cocaine. He ran into Angel, a known dealer, who sold him a bindle of rock cocaine that defendant hid from police inside his pants. With his remaining cash, defendant planned to buy a cocaine pipe to smoke his new purchase. Suddenly, Detectives Gamboa and Katzmiller drove up, placed defendant against a wall, handcuffed and searched him. Detective Gamboa grabbed defendant by the arm and demanded to know where the "dope" was. When defendant said he did not know of any dope, Detective Gamboa began walking around and scanning the ground. He picked up an unknown object, returned to defendant and called for backup officers on his cellular telephone. Defendant was taken into custody.

Defendant denied engaging in a drug transaction with Moore, whom he had never before seen. He also denied tossing or throwing any rock cocaine on the ground. Defendant testified he did not sell or intend to sell rock cocaine to anyone; he possessed

the bindle recovered from his pants solely for personal use. Defendant acknowledged he had two prior felony convictions.

DISCUSSION

A. *The Disputed Testimony*

During direct examination, defense counsel attempted to question defendant about certain statements that Detective Gamboa purportedly made to him at the police station. The prosecutor objected, asserting the question sought information that was both irrelevant and inadmissible hearsay. In a sidebar conference, defense counsel made an offer of proof that defendant would testify Detective Gamboa handed him a cellular telephone, "and said, hey, you scratch my back, I'll scratch yours. If you order up a kilo of cocaine, then I can help you."

"The Court: It's not relevant, and I don't – I would need a better offer of proof, otherwise, I don't know what I'm dealing with here.

"[Defense Counsel]: Well, I think it's entirely relevant because we're basically stating that the officers' clearly – from [defendant's] testimony we're stating the allegations by Detectives Kizmiller and Gamboa are not, in fact, the truth. Now, why are they saying something that's not the truth? Well, perhaps it's because they need to charge him with a more serious offense. And they had been given this opportunity to – to try to find a seller and wasn't able to do so and that basically they –

"The Court: You told none of this to [the prosecutor] before [defendant] got on the stand?

"[Defense counsel]: Well, I mean, this is – this is the defendant testifying. I mean, if it were another witness, of course, I would have an obligation to turn it over, but this isn't a defense witness testifying, this is the defendant.

"[Prosecutor]: I'll make a different objection. No. 1, it's not relevant; No. 2, I'll make an objection, [Evidence Code section] 352. It's misleading, it's inflammatory to the jury. This is information that's way beyond the evidence so far. But also I believe

it's – in addition, their point is – that it, in fact, is hearsay, because now the defense is saying that he's offering it to show – for the truth to show motive for the officers to lie.

"[Defense counsel]: But that's simply not the truth. That's not the context of the statement. It has nothing to do – like he's actually – like it's not an assertion. He – he's basically saying, can you do something. It's an effect on the hearer.

"The Court: I disagree. I understand why you want to get it in, but I do believe there's a hearsay objection on this.

"[Defense Counsel]: How is that possible?

"The Court: You're impuning the entire statement by the officer by saying that he offered to do something entirely different, offered to, hey, make a phone call and order some up and we'll cut you some slack. That has to be for the truth of the matter asserted. Why would this – I don't know what [defendant] is going to say, but I think I am going to sustain the objection."

B. ***The Improper Exclusion of the Testimony Was Not Prejudicial***

The parties agree the excluded testimony that Detective Gamboa told defendant, "hey, you scratch my back, I'll scratch yours. If you order up a kilo of cocaine, then I can help you", did not constitute hearsay as it was not being offered for its truth. (Evid. Code, § 1200, subd. (a).)[3] Rather the purpose in introducing the testimony was to show Detective Gamboa made a certain proposal to defendant, whether or not the detective actually intended to act on that proposal.

As nonhearsay evidence, the excluded testimony was admissible because it was relevant. (Evid. Code § 350.) Evidence is relevant if it goes to witness credibility, tends to establish a material fact, or tends to prove or disprove any disputed fact of consequence to the case. (Evid. Code, § 210; *People v. Boyette* (2002) 29 Cal.4th 381,

---

[3] Evidence Code section 1200, subdivision (a), defines hearsay: "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."

428.) Even weak evidence is relevant if it tends to prove an issue before the jury; the weight of such evidence is for the jury to determine. (*People v. Freeman* (1994) 8 Cal.4th 450, 491.) Here, the testimony about Detective Gamboa's proposal to defendant supported the defense theory the detectives hoped to use defendant to ensnare his drug supplier, so they pressured defendant to cooperate by having him charged with a more serious drug offense than the one he actually committed. The proffered testimony was consistent with the defense theory, while also undermining the credibility of Detective Gamboa's testimony as to the quantity of cocaine he recovered from defendant. Thus, the testimony should have been admitted.

Nonetheless, there is no possibility the trial court's evidentiary ruling is prejudicial, whether harmless error is judged under the state standard for erroneous evidentiary rulings, which we believe applicable here (*People v. Cunningham* (2001) 25 Cal.4th 926, 998-999; *People v. Watson* (1956) 46 Cal.2d 818, 836), or as defendant urges, the elevated standard, which would be required if the ruling had completely prevented him from establishing a defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 691 [106 S.Ct. 2142, 90 L.Ed.2d 636]; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Defendant's theory that the detectives decided to falsify the more serious charge of possession of cocaine base for sale against defendant because he rejected their proposal to contact his supplier is at best, far-fetched. In any event, the only issue in this case was whether defendant had engaged in selling rock cocaine, which was fully explored at trial.

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.